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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

In re LUIS F., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
LUIS F.,  
Defendant and Appellant.

A142900

(Sonoma County  
Super. Ct. No. J37940)

Minor Luis F. admitted a charge of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and was declared a ward of the juvenile court (Welf. & Inst. Code, § 602).<sup>1</sup> After a detailed psychological evaluation of Luis, an assessment of his eligibility for Regional Center services, two meetings of the probation department's screening committee, and two exhaustive probation reports, the probation department reluctantly recommended that Luis be committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), a recommendation made because the department had no other resources available to it that could meet Luis's needs. The juvenile court considered all possible disposition options and ultimately adopted the

<sup>1</sup> All undesignated statutory references are to the Welfare and Institutions Code.

probation department's recommendation. Luis challenges his DJJ commitment on multiple grounds, none of which has merit. We therefore affirm.

## **BACKGROUND**

### **The Offense and the Petition**

On March 25, 2014, then 14-year-old Luis was taken into custody and detained at juvenile hall after he walked up behind a male student at school, wrapped a headphone cord around his neck, and choked him. The victim reportedly blacked out, although due to the intervention of other students, he escaped without permanent injury.

A section 602, subdivision (a) petition, and its subsequent amendment, alleged that Luis committed two felonies: assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and intimidation of a victim or witness (*id.*, § 136.1, subd. (b)(1)). Both counts were alleged to be felonies within the meaning of section 707, subdivision (b).

On April 24, Luis admitted the assault charge. The court dismissed the intimidation charge subject to *In re Jimmy P.*,<sup>2</sup> sustained the petition, and found that Luis came within the jurisdiction of the juvenile court.

### **Report and Recommendation of the Probation Department**

The probation department's report and recommendation began with additional details regarding the March 25 incident. A school administrator contacted a school resource officer, who met with the victim and observed that he had a raised red mark around his neck, appeared to be shaken, and complained of pain to his neck. The victim confirmed that Luis had wrapped a cord around his neck. He believed Luis was not playing around because Luis told him the principal had told Luis that the victim had reported that Luis had been doing drugs in class. Luis asked the victim why he said that, adding that he would kill the victim if he ever told anyone about it. Asked if there was "bad blood" between him and Luis, the victim told the officer he did not talk to Luis and most people he knew were afraid of Luis because he was always angry and acted strange. According to the probation report, the officer made a point of conveying to the district

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<sup>2</sup> *In re Jimmy P.* (1996) 50 Cal.App.4th 1679.

attorney's office that students were fearful of Luis because he had been displaying alarming, " 'off' " behavior.

Luis admitted to the resource officer that he wrapped the cord around the victim's neck but said he was "just playing" and that it was "only a joke." He denied he was trying to hurt him or saying anything about killing him.

According to the probation report, Luis's only prior referral to the probation department was for possession of marijuana on school grounds the prior month. The district attorney declined to file charges in that case.

In an interview with the probation officer, Luis acknowledged having wrapped his headphone cord around the victim's neck but said he did not intend to hurt him and did not know why he had done it. He stopped when another student intervened and he realized what he was doing. He looked around and saw that " 'things were moving,' " so he laughed and went to class. He would apologize to the victim if he saw him but he " 'wouldn't really have anything to say' " to the court because he " 'did this without thinking . . . .' "

The probation officer interviewed Luis's mother by telephone. She said she brought Luis to the United States from Mexico a year earlier so he could be raised with his brothers and sisters. For the 13 years before that, she had infrequent telephone contact with him, as he was primarily raised by his maternal grandmother in Mexico. When he came to the United States, everything was fine at first, but then he " 'started touching' " her five-year-old daughter and " 'decided to leave the house' " when she told him he could not do that. Luis went to live with his father in Arkansas, but returned a few months later when his father was jailed. After staying with his mother for two or three days, he went to live with his mother's sister, Victoria. Luis's mother told the probation officer that there were stable homes available to him in Mexico, including her brother's residence in Tijuana and her mother's house in Michoacan, where he grew up. She was not willing to have him returned to her home because she worried about her daughter's safety.

The probation officer met with Luis's aunt, Victoria. According to Victoria, Luis first came to stay with her several months earlier, when she found him crying on her doorstep late one night after his mother bit him during an argument over a cell phone and kicked him out of the house. Luis stayed with Victoria until his father came to pick him up. After Luis left his father's house, he stayed with his mother again, but she would only allow him to stay for a few days. Victoria took him in again, although Luis's mother refused to put " 'it in writing.' " She had not had any problems with Luis while he lived with her, describing him as cooperative and helpful, and noting that he got along with everyone in her house.

Victoria expressed surprise over Luis's arrest, because she " 'didn't think he was capable of that.' " She was willing to take him back into her home, although she would be more strict with him. She was aware of her sister's sexual abuse allegation, but she wondered how it was possible since her sister was always home.<sup>3</sup> Victoria believed Luis needed " 'a lot of counseling because he is hurting and holding a lot of things inside.' " At times he would lock himself in the bathroom and she could hear him sobbing; other times, he would suddenly become angry and punch walls and furniture.

As to Luis's family history, the probation officer related that Luis was born in Mexico. When he was three months old, his mother moved to the United States, leaving Luis in the care of his maternal grandmother. When Luis was eight years old, his grandmother died, and he moved between various relatives' homes in Mexico until coming to California the previous year. Luis said after his grandmother died, his mother started communicating with him, and people told him she was a good person so he wanted to come to the United States and get to know her. Once he got to California, however, he discovered that what he had heard about his mother was untrue and that she was in fact abusive. Sometime around October 2013, she kicked him out and he went to live with his father in Arkansas. He had a relationship with his father because his father had occasionally visited him in Mexico, but a few months after Luis went to live with

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<sup>3</sup> Luis's mother had five other children 10 years old and under and was not employed.

him, he was incarcerated on a homicide charge. While he was not prosecuted on that charge, he was kept in custody by the immigration authorities, and it was believed he was still incarcerated in Texas. As a result, in January 2014, Luis returned to California.

Since a few days after his return, Luis had been living with his aunt Victoria. She rented two rooms in a house, where she lived with three of her five children. She had a boyfriend, and he and his daughter would occasionally spend the night as well. Victoria was self-employed as a housecleaner and maintained a schedule that allowed her to closely supervise the children.

As to Luis's educational background, while living in Mexico, he attended school through the fourth grade. When he came to the United States, he enrolled in eighth grade. He attended a private Christian school for the few months he lived in Arkansas. Once back in California, he was referred to a school with an English as a Second Language program. Luis claimed he could read and write in English, although it was not always easy for him. Victoria told the probation officer, however, that Luis was not doing well in school because English was difficult for him and other students made fun of him.

According to school records, Luis's attendance was good. He had two suspensions, however, one in March 2013 for punching another student and another in February 2014 following a second fight. At the time of the second fight, he was found to be in possession of marijuana, which he claimed had been planted on him. According to Luis, other students asked him to cut school or offered him drugs, but he always refused. Victoria said she suspected he was using marijuana and had bought a drug testing kit, but had never used it. During the time Luis was in Arkansas, his stepmother believed he was “ ‘huffing.’ ”

Turning to Luis's mental health, Luis said he once participated in counseling at the urging of his aunt, who thought he needed it because of his anger issues and problems with his mother, but he did not like it. While Luis denied having anger issues, his mother and aunt both expressed concern about his anger. Luis did admit he was depressed when he was in Arkansas and could not see his father; and his aunt and mother confirmed that

while Luis was there he attempted to commit suicide by hanging himself from a tree, but his stepmother intervened. He was not hospitalized following that incident, nor did he receive any counseling.

As to abuse Luis had suffered, he reported that his mother was abusive on two occasions, the time she bit him and another time when she whipped him with a cord, which ultimately led to her telling him she did not want to see him again and him leaving the house. His mother denied any abuse, claiming he “ ‘decided to leave’ ” after she confronted him about inappropriately touching his half sister. The allegations of abuse were referred to the Health and Human Services Department, but were closed after Luis was taken into custody on this case.

According to Victoria, Luis revealed to her he was the victim of an incident of sexual violence when he was eight years old. He was crying and shaking when he told her about it, and he said he had never disclosed it to anyone else.

During Luis’s time in juvenile hall, there were two incidents involving aggression against him. In the first, he was punched in the face by a fellow resident who had been pressuring him to join the Sureño gang. In the second, he was struck in the neck during a basketball game, although it was later determined to be an accident. Juvenile hall staff reported that Luis typically sat with the Sureños, but he “ ‘clearly doesn’t fit in’ and only spends time with them because as a Spanish-speaker, they are the only people he can communicate with.”

The probation department’s screening committee, which included staff from the probation department, camp, juvenile hall, mental health, placement, and schools, considered Luis’s case. Overall, they expressed grave concerns about Luis’s psychological wellbeing and community safety. Mental health staff believed his attempted strangulation of his classmate and his statements about it were typical of a child who had suffered abuse. The committee members agreed he seemed genuinely remorseful about the assault, but that he did not appear to have any insight into why he became violent. They felt he could pose a real danger to himself and others, particularly since he seemed unable to control his angry outbursts. In the words of the probation

officer, “It was the feeling of the committee that Luis is not so much delinquent as he is deeply troubled.”

In order to gain further insight into Luis’s needs and how best to facilitate treatment, the probation department recommended that Luis be committed to the DJJ for a 90-day diagnostic study. Mental Health staff stressed that an evaluation by a Spanish-speaking psychologist who could speak directly with Luis and understand his cultural background would provide the most meaningful information because it would eliminate misunderstandings, or even misdiagnoses, arising out of translation or ignorance of cultural norms. The screening committee was aware, however, that the court did not have contracts with any psychologists who were in a position to evaluate Luis accurately, and it thus recommended the diagnostic study as an alternative.

At a May 8, 2014 dispositional hearing, the court appointed Gloria Speicher, Ph.D. to conduct a psychological evaluation of Luis to aid in determining an appropriate disposition for him. The matter was then continued so Victoria could be present at disposition.

At the continued dispositional hearing the following week, the court declared Luis a ward of the juvenile court, found that he came within the meaning of section 707, subdivision (b), and ordered him committed to the DJJ for a 90-day diagnostic study, pending receipt of Dr. Speicher’s report.

### **Psychological Evaluation by Dr. Speicher**

Dr. Speicher conducted a detailed evaluation of Luis, involving many hours of interviews (of both Luis and various relatives) and testing, all of which was done with the assistance of Spanish interpreters. The report contained a lengthy summary of Luis’s family history and background, adding many details to those previously learned by the probation department.

Dr. Speicher noted that Luis was expelled as a result of his assault on his schoolmate. As part of the expulsion process, his teachers were asked to provide an objective assessment of him. One teacher described his classroom behaviors as inappropriate, with Luis sulking or angry, seldom paying attention to the lesson, “off task

and ‘doing something sort of odd,’ ” with a volatility and lack of deference that was a “ ‘bit scary.’ ” Another teacher reported that Luis “could ‘flip, in a matter of seconds, from relative calm to extreme rage’ without a hint of stimulation from the environment” and that he was “ ‘clearly unable to control himself’ and [was] a danger to himself and others . . . .” A third reported that he “ ‘exhibited unusual behaviors early on,’ ” and had arrived in her class immediately following the strangulation incident and “ ‘did not look disturbed or angry in any way.’ ”

Dr. Speicher also reported that following his suspension, Luis met with the vice principal. Concerned about Luis’s level of anger during the meeting, the vice principal referred Luis to the school psychologist. Luis confided in the psychologist that he had been molested in Mexico, but he subsequently learned this information was shared with his teachers. This breach of confidence made him very uncomfortable, and he refused further counseling.

Dr. Speicher provided this assessment of Luis’s school behavior: “It is very clear that Luis’ behaviors would be considered unusual and odd when compared to other American students. While still clearly problematic, his behaviors may be better understood in the context of an individual who does not speak the language and does not understand the social rules of the broader American culture or of the more insular, but still confusing (due to subtle differences from his hometown), Hispanic subculture within America. His behaviors are also better understood when considering that his lack of education in Mexico also means that he was not exposed to the socialization that occurs within that system. The American system of education places a very high value on impulse control, cooperation, focus on acquisition of knowledge and deference to authority. While not at all excusing his negative behaviors, it is not especially surprising that under the stress of his many changes and repeated experience of loss, rejection and abuse, he might regress and *interpret* the behaviors of others (especially his peers) as bullying, threatening and potentially humiliating and respond by lashing out and fighting.”



Dr. Speicher administered a number of tests as part of her evaluation. The first test measured nonverbal intellectual abilities and was designed to reduce the impact or effects of such factors as motor coordination, verbal skills, time pressure, and primary language. Luis scored in the second percentile, which equated to the abilities of an eight year, two month old. When using a 95 percent confidence level, this standard score fell in the extremely low to borderline range (59 to 77). In light of this, Dr. Speicher opined that Luis's struggles in school may not be due to his language barriers as presumed, but rather to lower functioning as indicated by this test result.

The second test measured cognitive processing with a particular emphasis on visuospatial memory. Luis again received very low percentile scores, which Dr. Speicher said could indicate a possible nonverbal learning disability that warranted further testing.

The third test assessed risk for dangerousness, sophistication and maturity, and amenability for treatment. The results indicated that Luis was relatively immature, lacked criminal sophistication, and had a low likelihood for re-offense and risk of dangerousness. The results also suggested Luis's "psychological problems (depression, anxiety, Post Traumatic Stress Disorder and unresolved grief) are amenable to focused treatment. However, further testing is required to clarify the possibility of organic brain impairment that would impact treatment potential. He does not show severe antisocial or psychopathic features and criminal lifestyle does not appear to be ingrained. . . . He has very unfortunately, experienced a breach of confidentiality that is likely to have a lasting negative effect of his willingness to trust others in a therapeutic context. *It would be imperative for that breach to be discussed and worked through in order for him to benefit from therapy.*"

Based on her evaluation, Dr. Speicher identified the following diagnostic considerations: Unspecified Neurocognitive Disorder, with intellectual disability versus specific learning disability as another consideration; mood disorder; and posttraumatic stress disorder secondary to sexual abuse. She recommended that Luis be provided psychotherapy treatment with a male Hispanic therapist to address the trauma he suffered due to sexual abuse. She also recommended he be evaluated by the North Bay Regional

Center (NBRC) to determine whether he had a developmental disability that would qualify him for Regional Center services.

In closing, Dr. Speicher reported that Luis was in “strong need of an emotionally supportive environment, compassionate mentoring, focused psychotherapy and clearly safe, as well as supportive, social interactions with peers and opportunities to engage in pro-social activities appropriate to his level of development.” He did not impress her “as a danger but as a youth with limited capacities and resources with which to cope with overwhelming environmental challenges.”

### **Evaluation by the NBRC**

At a May 23 hearing, the court considered Dr. Speicher’s report and ordered that Luis be evaluated by the NBRC. Luis’s transfer to the DJJ was deferred pending the NBRC’s determination regarding his eligibility for Regional Center services.

The NBRC submitted its report on July 14. It had retained Ubaldo Sanchez, Ph.D., to assist it in determining whether Luis had an intellectual disability or similar condition. Dr. Sanchez had administered the Spanish version of the Wechsler Intelligence Scale for Children-IV (WISC-IV) and conducted a mental status examination.<sup>4</sup> Luis received a full scale IQ score of 70, which, according to Dr. Sanchez, put him “in the lower limits of the borderline range of measured intelligence on the WISC-IV.” Dr. Sanchez noted, however, that “[t]he scores should be viewed with caution given the cultural bias of the test.” He added that Luis’s “poor performance on tasks measuring immediate auditory recall, the capacity for sustained effort, attention, and concentration, mental effort, sequencing, and mental manipulation caused his overall IQ to fall within the lower limits of the borderline range.”

Dr. Sanchez concluded that Luis met the criteria for the following clinical diagnoses: borderline intellectual functioning (rule out intellectual disability), other specified trauma—stress related disorder, child sexual abuse, parent-child relational problem, and academic or educational problem. He recommended ongoing mental health

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<sup>4</sup> He also mailed an Adaptive Behavior Assessment System-Second Edition (ABAS-II) questionnaire to Luis’s mother for completion, but she did not return it.

treatment for Luis, “[g]iven his history of sexual abuse, sudden death of his grandmother, incarceration of his father, difficulties with his mother, [and] detention in Juvenile Hall . . . .”

Based on Dr. Sanchez’s findings, the NBRC eligibility team determined that Luis did not have a defined developmental disability that would render him eligible for Regional Center services. It suggested, however, that he “may benefit from an assessment by the appropriate school system as to whether he might qualify for special education services due to either learning or emotional challenges.”

At a July 15 hearing, the court referred Luis’s case back to the probation department for further screening to explore placements that might be appropriate for him in light of the findings of Drs. Speicher and Sanchez.

### **The Probation Department’s Supplemental Report**

On July 30, the probation department prepared a supplemental disposition report. After summarizing the substance of Dr. Speicher’s report, the department addressed the NBRC’s suggestion that Luis be assessed for special education services. It noted Luis was “functioning at an acceptable level in his Juvenile Hall classes,” earning a cumulative grade point average of 2.46.” Because of this, the Sonoma County Office of Education (SCOE) resource specialist at juvenile hall had determined there to be no basis for assessing Luis for an Individualized Education Plan (IEP).

The probation department reported that the screening committee had again met to determine the best placement option for Luis, in light of Drs. Speicher’s and Sanchez’s evaluations. As the department summarized it:

“The committee still felt strongly that releasing the minor to any kind of home-based program is not appropriate for community safety reasons. He continues to have no understanding of why he became so violent with the victim, and while he has not acted out in custody, he has a history of sudden, angry outbursts and emotional instability. The only local family member willing to have him is his aunt, Victoria, who is not his legal guardian. She does not get along with Luis’s mother, who refused to sign anything authorizing her sister to care for him when Victoria asked for that in the past.

The minor's aunt already has three children at home, she lives in a shared housing situation, and she works full-time running her own business. While she obviously cares for Luis, the committee did not believe she could realistically ensure that his needs for treatment and supervision are met, nor is she legally able to approve services that require consent from a parent or guardian. The committee was aware that Luis's mother is not an option; she does not want him in her home based on her suspicion that he molested his five-year-old half sister, and during this department's limited interactions with her, she has demonstrated no interest in caring for him. Placement with the minor's father could potentially be considered if he was available, but no one in the family had specific knowledge of his location, whether he is still incarcerated, or if he has been deported.

"The committee also noted that many of the same issues that preclude community treatment would apply in the case of home removal as well, including that the minor does not have a legal guardian willing and able to take responsibility for him while he is in a residential program or afterward. Additionally, Luis does not speak English, and Placement staff at the meeting advised they are not aware of any facilities available to this department where treatment can be provided in Spanish. Even if language and family were not an issue, placement staff indicated that programs utilized for low-functioning or developmentally disabled children do not typically accept those with violent offenses. It was also reported that level 14 programs where treatment is provided for high-needs juveniles require an Individual Education Plan (IEP), which it is entirely possible Luis would not qualify for despite his cognitive deficits since, for example, even Dr. Sanchez could not discern whether the minor's borderline IQ or his lack of education is responsible for his low test scores. Committee members ruled out Probation Camp as a possible placement since Luis is too young for a Camp commitment, and even if he was an appropriate age, his lack of English language skills, his cognitive limitations, and his family situation would pose significant barriers to full participation in the program. Camp staff also voiced some hesitation about the minor's volatility given residents' access to tools, and about his potential victimization by more sophisticated residents.

“Finally, the committee reviewed the past recommendation for a DJJ Diagnostic Study, noting that, at the time, it was felt this department’s greatest need was for information that would help determine how to treat the minor appropriately. Now there are two evaluations that both describe a need for mental health services to address Luis’s history of trauma and disruption in the context of his borderline intellectual capacity. The screening committee, having determined that this department does not have access to any programs that could provide the kind of in-depth services and specialized support the minor needs while ensuring both his safety and the safety of the community, felt that a diagnostic study is no longer necessary and would only delay the minor’s treatment further. Instead, the committee believed a straight DJJ commitment is more appropriate at this point since if he goes to a Diagnostic, the minor would only return in 90 days to the same dearth of resources, which further screening would not resolve.”

The probation department confirmed that it did not have access to any resources that could adequately meet Luis’s needs: “This department would be happy to refer Luis to a program that fits Dr. Speicher’s description of what would benefit him most, but the sad fact is that none exists. The committee recognized again that the minor lacks criminal sophistication, has experienced multiple losses, and has been brutally victimized in the past, all reasons for compassion; however, everyone felt strongly that both the minor’s safety and that of the community must be considered as well. The screening committee ultimately thought that the previously submitted recommendation for the minor to participate in a 90-day Diagnostic Study at DJJ is no longer appropriate given that there are no programs outside of DJJ where the kind of in-depth treatment he needs is available. The committee recommended a straight DJJ commitment instead, noting that while it is not an ideal setting, it is really the only treatment resource open to Luis. Materials provided by DJJ staff explain that each ward they accept participates in psychological testing, and if the ward has a low IQ, he is ‘referred for special consideration by the Chief Psychologist, who will determine the most appropriate placement,’ which could be ‘a suitable mental health unit within DJJ, or in some cases a youth may be deemed most suitable for placement through the Department of Mental

Health Services or Department of Developmental Services.’ The members of the screening committee were clear that the recommendation for a DJJ commitment is not intended to be punitive; rather, it was seen as the only placement that can even begin to meet Luis’s needs while offering some assurance of safety, something no one was willing to sacrifice.”

### **Disposition Hearing**

At an August 6, 2014 disposition hearing, the court began by expressing its agreement with the probation department’s recommendation, stating, “I believe [the DJJ] is the one location that we have in our tool box of remedies that is sufficient at this time, number one, for the issues with which Luis presents. The reformatory nature of the Division of Juvenile Justice, I believe, is appropriate. I believe that they can provide the necessary psychological, social and educational support that he will need. And I don’t believe that those exist in the community. [¶] As I stated back, I believe, at the time of the very first disposition, I did not think that this was appropriate for a community placement due to the seriousness and, frankly, the viciousness of the attack on the young fellow who is our victim.”

Counsel for Luis zealously advocated for a less restrictive placement, urging that “close monitoring through CD and intensive programs such as ACT or WRAP in the home of the aunt could be very successful.” She alternatively suggested a program like Children’s Home of Stockton, where they address violence and prior sexual abuse and have an onsite school that is capable of dealing with special education needs, and “many other programs. Just leafing through, looking at Harrison, Aldea, places where I know we have other boys from Sonoma County, there seem to be many programs that could meet the collection of needs that Luis has.” She also suggested the Quest program at juvenile hall, which has a “Spanish speaker, who is able to communicate in Spanish to the Spanish-speaking residents and who is incredibly capable in terms of reaching out to services and bringing those services in to the participants in that program . . . .”

The court responded that it had considered all of those options, but that “[w]hile rehabilitation of the minor is a paramount concern, the Court cannot ignore its obligations

to community safety as well.” It therefore vacated the 90-Day diagnostic study order and ordered Luis committed to the DJJ for three years with credit for 135 days in custody. It also found, among other things, that Luis was “not an individual with exceptional needs and educational records do not indicate that a determination has been made regarding any exceptional needs, subject to any further testing that may be done. An order to that effect was entered the following day.

Luis filed a timely appeal.

## **DISCUSSION**

### **A. Issues Raised on Appeal**

In his opening brief, Luis presents four arguments challenging his DJJ commitment: (1) there was no substantial evidence the commitment would probably benefit him; (2) there was no substantial evidence less restrictive alternatives were unavailable or inappropriate; (3) the juvenile court abused its discretion by committing him to the DJJ without a 90-day diagnostic study; and (4) the court’s finding that Luis did not have “exceptional needs” must be reversed and the matter remanded for him to be assessed for an IEP and be given a complete cognitive evaluation.

A month after filing his opening brief, Luis filed a supplemental opening brief in which he additionally argues that the dispositional order must be reversed because the court imposed an unauthorized sentence.

### **B. The Juvenile Court Did Not Abuse its Discretion in Committing Luis to the DJJ**

#### **1. The Applicable Law and Standard of Review**

In determining the proper disposition for a minor, “the court shall consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor’s previous delinquent history.” (§ 725.5; *In re Gary B.* (1998) 61 Cal.App.4th 844, 849.) If the juvenile court is considering a DJJ commitment, “there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJJ] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives.” (*In re Angela M.*

(2003) 111 Cal.App.4th 1392, 1396; accord, *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576; *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396; see also § 734 [“[n]o ward of the juvenile court shall be committed to the [DJJ] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJJ].”].)

We review a DJJ commitment order for abuse of discretion. (*In re Jose T.* (2010) 191 Cal.App.4th 1142, 1147.) “ ‘An appellate court will not lightly substitute its decision for that rendered by the juvenile court.’ [Citation.] An appellate court ‘must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citations.]’ [Citation.] ‘In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law. . . .’ [Citation.]” (*Ibid.*; accord, *In re Michael D.*, *supra*, 188 Cal.App.3d 1392, 1395.) These purposes include (1) “the protection and safety of the public,” and (2) “care, treatment, and guidance that is consistent with [the minor’s] best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances[, which] may include punishment that is consistent with the rehabilitative objectives of [the juvenile court law].” (§ 202, subds. (a), (b).)

## **2. Substantial Evidence Supports the Juvenile Court’s Finding that Luis Would Probably Benefit from the DJJ Commitment**

Luis first contends that there was no substantial evidence the DJJ commitment would probably benefit him. We conclude otherwise.

In ordering the DJJ commitment, the court expressly cited the DJJ’s reformatory nature. At the time of disposition, Luis was 15 years old and had a sustained petition for assault with a deadly weapon. As the court noted, this was a serious and vicious attack that “[o]nly through the intervention of third parties did . . . not turn into something that was horribly serious, instead of something that is just very serious.” Prior to expulsion for the assault offense, Luis had twice been suspended from school for fighting. And



there was feedback from multiple sources—Luis’s mother, his aunt Victoria, various teachers and administrators—that Luis had anger issues and was prone to abrupt outbursts. These factors suggest the reformatory nature of the DJJ would be beneficial to Luis.

The DJJ would also provide psychological, social, and educational support for Luis. According to the DJJ staff, each ward participates in psychological testing. If the ward has a low IQ, he is, according to DJJ materials, “ ‘referred for special consideration by the Chief Psychologist, who will determine the most appropriate placement,’ ” which could be “ ‘a suitable mental health unit within DJJ, or in some cases a youth may be deemed most suitable for placement through the Department of Mental Health Services or Department of Developmental Services.’ ” The probation department recognized that Luis needed treatment for his mental health issues, as well as any cognitive impairment, and the court rightly believed he would receive such treatment at the DJJ.

Luis objects that this did not constitute substantial evidence that he would probably benefit by the commitment because there was no evidence he would receive the treatment recommended by Drs. Speicher and Sanchez (e.g., a male Hispanic psychotherapist, a complete cognitive evaluation in Spanish). We are unaware of any authority—and Luis cites none—suggesting that a ward will only benefit from a DJJ commitment if he or she will receive the precise treatment recommended by a mental health professional. That is not the standard. As noted, the question is whether the ward would *probably benefit* from the DJJ commitment, and there was substantial evidence that Luis would.

### **3. Substantial Evidence Supports the Juvenile Court’s Finding that There Was No Less Restrictive Alternative Available**

Luis additionally contends there was no substantial evidence that less restrictive alternatives to a DJJ commitment were unavailable. He submits that there were numerous viable options, including the home of Victoria or his father, a licensed community care facility, a foster home, juvenile hall, camp, or supervision by the Mexican juvenile court. The record demonstrates that the screening committee, the

probation department, and the juvenile court all thoroughly evaluated the possible options, and substantial evidence supports their conclusion that the DJJ was the only alternative.

The screening committee and the probation department felt strongly about not releasing Luis to any kind of home-based program for community safety reasons. Luis had no understanding as to why he became so violent with the victim of his assault, and he had a history of sudden, angry outbursts and emotional instability. He had been in two fights at school before the instant assault, and there were multiple reports about his anger issues. At the disposition hearing, the court reiterated that it considered community placement inappropriate due to the “seriousness” and “viciousness” of Luis’s attack on his schoolmate. The circumstances surrounding the strangulation incident and the evidence regarding Luis’s anger was substantial evidence supporting the court’s conclusion. This eliminated release to Victoria or Luis’s father, as well as other community-based options such as foster care.

The court also considered, but rejected, other placement options. As advised by the probation department, placement in a residential treatment program or similar situation was not a viable option. Luis did not have a legal guardian willing to take responsibility for him while in a residential program or following his release. Victoria was seemingly willing, but Luis’s mother previously refused to sign papers giving Victoria legal authority over Luis. Further, Luis’s lack of English language skills prevented placement in such programs, since the screening committee was unaware of any facility that provided treatment in Spanish. Beyond family support and language issues, the placement staff advised that programs available for low-functioning or developmentally disabled children typically do not accept minors with violent offenses, which ruled out Luis who had a sustained petition for assault with a deadly weapon.

The screening committee also considered the possibility of a camp placement. It rejected this as a viable option, however, because Luis was too young. Age barriers aside, the committee also advised that “his lack of English language skills, his cognitive limitations, and his family situation would pose significant barriers to full participation in

the program. Camp staff also voiced some hesitation about the minor's volatility given residents' access to tools, and about his potential victimization by more sophisticated residents."

The screening committee also considered placement at a "level 14 program," which provides treatment for high needs juveniles. Such programs require that the minor have an IEP, but the committee noted that "it [was] entirely possible Luis would not qualify for [an IEP] despite his cognitive deficits since, for example, even Dr. Sanchez could not discern whether [Luis's] borderline IQ or his lack of education [was] responsible for his low test scores." This was supported by the SCOE resource specialist in juvenile hall, who related that if Luis was performing academically—and he was, attaining a cumulative grade point average of 2.46 while at juvenile hall—there would be no reason to assess him for an IEP.

Luis also suggests that juvenile hall was a placement option, because its Quest program had a Spanish language treatment provider. There is, however, no authority supporting lengthy commitments at juvenile hall for post-disposition minors. (See, e.g., Cal. Code Regs., tit. 15, § 1302 ["'juvenile hall' means a county facility designed for the reception and temporary care of youth detained in accordance with the provisions of this subchapter and the juvenile court law"]; § 850 [describing juvenile hall as housing for minors "alleged to come within the jurisdiction of the juvenile court"]; § 851 ["juvenile hall shall not be in, or connected with, any jail or prison, and shall not be deemed to be, nor be treated as, a penal institution."].)

Lastly, Luis argues the court should have considered placement in Mexico under the Mexican juvenile court's supervision. Nothing in the record suggests such an arrangement was feasible, let alone in Luis's best interest. After his grandmother died, Luis spent approximately five years living with different relatives in Mexico before coming to the United States. For much of that time, he did not attend school, and Victoria told the probation officer that he did not have a stable home there. Luis's mother told the probation officer that " 'of course' Luis [had] stable homes available to him in Mexico, including her brother's residence in Tijuana and her mother's house in

Michoacan . . . .” Coming from someone who had little contact with Luis during the 13 years he lived in Mexico and who took no interest in caring for him, the court rightly gave this claim little to no credence.

In short, the screening committee, the probation department, and the juvenile court thoroughly considered Luis’s needs and the available disposition options available to him. They unanimously agreed that there was no less restrictive alternative to the DJJ available. Substantial evidence supports this conclusion.

That being said, we note with grave concern the probation department’s representation that it “would be happy to refer Luis to a program that fits Dr. Speicher’s description of what would benefit him most, but the sad fact is that none exists.” For a minor who lacks criminal sophistication, is not “so much a delinquent as he is deeply troubled,” and needs “an emotionally supportive environment, compassionate mentoring, focused psychotherapy and clearly safe, as well as supportive, social interactions with peers and opportunities to engage in pro-social activities” to be committed to the DJJ for lack of a better alternative can only be described as an utter failure of the system. While our review of the record indicates that the court was duly satisfied that Luis would probably benefit from the DJJ commitment such that the disposition thus does not run afoul of *In re Aline D.* (1975) 14 Cal.3d 557, 562, it is nevertheless troublesome that the probation department “does not have access to any resources that can adequately meet the minor’s complex needs.” Quite simply, Luis perhaps deserved better.<sup>5</sup>

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<sup>5</sup> On our own motion, we sent a letter to counsel that reads as follows: “There does not appear to be evidence in the record that the juvenile court considered an out-of-state placement pursuant to Welfare and Institutions Code section 727.1, subdivision (b), before ordering the minor committed to the Department of Juvenile Justice. The Court would like the parties to address whether we should remand the matter for the juvenile court to make such an inquiry and, if not, why not.”

We received briefs from the parties, with counsel for Luis arguing that we should remand with directions that the juvenile court should consider an out-of-state placement, but candidly noting that an out-of-state placement may “not be in [Luis’s] best interest at this late juncture,” since he “has completed most of the maximum amount of time that DJJ could keep him confined” and will be released in March 2016.

#### **4. There Was No Basis for the Court to Order a 90-Day Diagnostic Study**

Section 707.2, subdivision (a) authorizes a juvenile court to “remand the minor to the custody of the [DJJ] for a period not to exceed 90 days for the purpose of evaluation and report concerning his or her amenability to training and treatment offered by the [DJJ].” Despite that Luis’s counsel objected when the court initially ordered Luis committed to the DJJ for a 90-day diagnostic study, Luis now argues that even if we conclude there was substantial evidence to support the DJJ commitment, we should nevertheless reverse and remand the matter for a diagnostic study. We disagree.

As noted, the court referred Luis’s case back to the probation department to explore placement options in light of the findings made by Drs. Speicher and Sanchez. The screening committee again reviewed Luis’s case and concluded that the probation department did not have access to any resources that would meet Luis’s needs. As such, its prior recommendation that Luis be referred to the DJJ for a 90-day diagnostic study was no longer appropriate, since there were no programs outside the DJJ where Luis could receive the services he needed. At disposition, the court agreed that nothing could be gained from a 90-day diagnostic study, because regardless of the results, it would still order Luis committed to the DJJ given the dearth of less restrictive alternatives. In other words, the diagnostic study would be a completely futile act. As there was no benefit to be gained from ordering a diagnostic study, there was no abuse of discretion in bypassing such a study.

*In re Norman H.* (1976) 64 Cal.App.3d 997, 1005, which Luis relies on but attempts to distinguish, supports our conclusion. There, the minor, who had been committed to what was then the California Youth Authority (CYA), argued on appeal that the juvenile court abused its discretion by not referring him for a diagnostic study. The court rejected this argument. It noted that the juvenile court had “facts at its disposal

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The Attorney General contends that there was no need to consider any out-of-state placement, as there was an adequate in-state placement option. The Attorney General also asserts the issue was forfeited, as not raised below.

We deem it unnecessary to address the issue in light of the fact that Luis will apparently soon be released from the DJJ.

from which it validly concluded further study was not needed” and was not in the minor’s best interest: it had a psychiatric report concluding that the minor would not benefit from placement in a state hospital but instead required a residential setting where he could gain vocational skills; it knew he was violence prone and thus needed a confinement facility; and it believed he was “operating on a more sophisticated ‘street level’ ” than suggested by his low IQ (*Id.* at pp. 1004–1005.) Likewise here: the court had facts at its disposal, namely, facts demonstrating the lack of any viable alternatives, from which it concluded that further study was not needed.

**C. There Is No Basis for Reversing the Court’s Finding that Luis Did Not Have “Exceptional Needs”**

Luis next challenges the juvenile court’s finding that he did not have “exceptional needs.” He contends that the matter must be remanded so he can be assessed for an IEP and given a complete cognitive evaluation so the court can make “properly informed findings” as to his educational needs. In support of his argument, Luis relies on *In re Angela M.* (2003) 111 Cal.App.4th 1392, but like *In re Norman H.*, *supra*, we find it unpersuasive.

In *In re Angela M.*, *supra*, 111 Cal.App.4th 1392, a court-appointed psychologist who evaluated the minor reported, among other things, that the minor “must undergo an IEP” assessment. (*Id.* at p. 1395.) At the conclusion of a probation violation hearing, the court found the minor in violation of probation and committed her to the CYA with no mention of her educational needs. (*Id.* at p. 1396.)

On appeal, the Court of Appeal affirmed the CYA commitment, but remanded to permit the juvenile court to make proper findings regarding the minor’s educational needs. It explained: “Although the record indicates special attention to [the minor’s] education needs was appropriate, the juvenile court did not mention this issue when committing her to the CYA. Remand is necessary to permit the juvenile court to make proper findings, on a more fully developed record, regarding [the minor’s] educational needs.” (*Id.* at p. 1399.)

Here, the probation department advised the court that both Dr. Sanchez and the screening committee questioned whether Luis would qualify for an IEP, so the probation department contacted the SCOE Resource Specialist at juvenile hall. She related that if Luis was “ ‘performing in the Court and Community School, there would be no reason to assess’ him for an IEP because if he [was] disabled, he has to demonstrate that disability ‘across all environments’ to qualify for special education services. As noted above, Luis appears to be functioning at an acceptable level in his Juvenile Hall classes.” In addition, Dr. Sanchez could not determine whether Luis’s low test scores resulted from his borderline IQ or lack of education. As a result, the probation department advised that “it is entirely possible Luis would not qualify” for an IEP. The court thus had before it information indicating that Luis was not in fact a child with exceptional needs. Its finding to this effect was therefore supported.

#### **D. The Sentence Imposed Was Authorized by Law**

In his final argument, Luis contends his DJJ commitment was an unauthorized sentence. This is so, he reasons, because section 733 establishes that a minor must have committed an offense listed in section 707, subdivision (b) in order to be eligible for a DJJ commitment, and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) is not one of section 707, subdivision (b)’s 30 enumerated offenses. In *In re Pedro C.* (1989) 215 Cal.App.3d 174, 182 (*Pedro C.*), the Sixth District considered—and rejected—this same argument. We see no reason to disagree with the *Pedro C.* holding.

In *Pedro C.*, the minor was alleged to have committed assault with a deadly weapon upon a peace officer in violation of Penal Code section 245, former subdivision (b).<sup>6</sup> The minor admitted the allegation but disputed that the offense qualified him for commitment to the CYA because it was not listed in section 707, subdivision (b). (*Pedro C.*, *supra*, 215 Cal.App.3d at p. 182.) The trial court initially concluded that

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<sup>6</sup> Penal Code section 245, former subdivision (b) made it a crime to: “ ‘commit[] an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer . . . engaged in the performance of his or her duties . . . .’ ” (*Pedro C.*, *supra*, 215 Cal.App.3d at p. 182.)

because the minor was not charged with assault by any means of force likely to produce great bodily injury, he did not come within the ambit of section 707, subdivision (b), but it later reconsidered the matter and reached the opposite conclusion. (*Id.* at pp. 178–179.) The Court of Appeal affirmed, holding that “ ‘ “A deadly weapon is one likely to produce death or great bodily injury.” ’ [Citations.] Necessarily, then, assault with a deadly weapon includes assault by means likely to produce great bodily injury.” (*Id.* at p. 182.) And, in light of the statutory scheme underlying section 707, subdivision (b), the court believed that to exclude assault with a deadly weapon merely because it is not specifically enumerated therein would “elevate form over substance.” (*Ibid.*) Therefore, the Court of Appeal concluded that assault with a deadly weapon “falls within the purview of section 707, subdivision (b) . . . .” (*Id.* at p. 183.)

Similar to the minor in *Pedro C.*, Luis admitted committing assault with a deadly weapon. We find no reason to depart from the *Pedro C.* conclusion that assault with a deadly weapon is subsumed within the meaning of assault with force likely to produce great bodily injury. Thus, consistent with *Pedro C.*, Luis was eligible for a DJJ commitment.

Luis has not cited to any case, nor are we aware of one, where a contrary view or interpretation has been expressed. He acknowledges the holding of *Pedro C.* but presents seven reasons why we should not follow that precedent. Suffice to say, none of the reasons compels us to reject the sound reasoning of *Pedro C.*

### **DISPOSITION**

The order committing Luis to the DJJ is affirmed.



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Richman, J.

We concur:

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Kline, P.J.

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Stewart, J.